No. 97-834

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ABE POLLIN, *et al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents point out that on page 23 of the petition, addressing the second question presented, petitioners inadvertently referred to the opinion of three judges in a 4-3 Tenth Circuit *en banc* ruling as the majority's when it was the dissent. That was an error for which counsel apologize to the Court and to respondents. It in no way alters, however, what the District of Columbia Circuit called the "important doctrinal issues" this case presents. A. 7a.

A. The Deference Issue.

The first, and fundamental, question presented in the petition is the level of deference to be accorded by courts to agency interpretations that are not promulgated through adjudication or rulemaking, but rather appear in informal issuances of one sort or another. At issue is the power of agencies in the modern administrative state to control the courts and the public through informally-issued statements.

1. The petition argued, citing four courts of appeals and books and articles by Anthony, Davis, Pierce, Manning, Koch and Sunstein, that it is a dangerous policy and contrary to the APA for courts to give *Chevron*-level deference to an agency issuance that is the product neither of adjudication nor of notice-and-comment rulemaking. The commentators warn that the danger is even greater when the agency is informally interpreting a regulation rather than a statute. See Pet. Cert. 20, 21. The D.C. Circuit holds the opposite. A. 10a, 12a-13a.

Respondents offer no response to those admonitions. They offer no policy justification whatsoever for the D.C. Circuit's holding that once a regulation is issued, the agency in "a continuing administration," A. 14a, may later assign it meaning, without either adjudication or APA rulemaking, and still receive *Chevron* deference from the courts. A. 13a-15a.

Respondents state that "Contrary to Petitioners' suggestion, this Court has not assigned any relevance to

whether an agency's regulatory interpretation was announced in an 'agency adjudication' or an interpretative rule." Br. Opp. 12 n.7. But in *Martin* v. *OSHRC*, 499 U.S. 144 (1991), this Court did exactly that. It held that "less formal means of interpreting regulations" are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers." 499 U.S. at 157, quoted at Pet. Cert. 15. Although *Martin* v. *OSHRC* is cited three times in the petition, the Brief in Opposition does not acknowledge it at all. See also, *e.g.*, *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process"); *Reno* v. *Koray*, 515 U.S. 50, 61 (1995) (interpretation issued without notice and comment receives only "some deference," citing *Martin*).

The Brief in Opposition assumes that courts should give *Seminole Rock* or *Chevron* deference even to informal agency issuances, but never explains why. Skipping that step, it invokes selected informal statements, beginning with some non-public correspondence between Civil Rights Division attorneys and certain sports-facility developers (not including petitioners). Br. Opp. 4. Later without any notice, explanation or *Federal Register* (or any other) announcement, the Justice Department printed some unsigned, undated pages as a "supplement" to be inserted in a technical assistance manual that had been issued more than two years before. This insert for the first time publicly announced a new and unprecedented requirement that wheelchair spaces at sports and entertainment facilities must provide wheelchair spaces that are elevated high enough to provide views over spectators who may stand during an event. The Department in its brief to the District Court stated that it considered these pages nothing more than "informal, non-binding guidance." C.A.A. 237-38. Never answered by respondents is the obvious question: how can what even the agency itself

designates as "non-binding" bind the public and have the force of *Chevron* deference on the courts? [1]

2. Respondents rely heavily on *Auer* v. *Robbins*, 117 S. Ct. 905 (1997), which they present as dispositive. But *Auer* certainly did not consider the interplay of *Chevron*, *Seminole Rock* and *Skidmore*,[2] or address the fundamental issues discussed and decided by the D.C. Circuit here. The *Auer* opinion, deferring to an agency position on a point as to which courts of appeals were divided, stressed that—unlike the present case—"[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment." *Id.* at 912.[3] And *Auer* did not involve a "by no means obvious," A. 9a,[4] reinterpretation of language that the agency had not written.

3. The Brief in Opposition contends that "[t]he D.C. Circuit neither applied *Chevron* nor suggested that *Chev-*

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[1] Respondents criticize petitioners for daring "to defy the Department." Br. Opp. 6. But the District Court emphasized (and the Court of Appeals did not disagree) that "the Court finds that defendants have acted in good faith," A. 50a, and that the agency's failure to follow APA procedures created "an unfortunate situation in which defendants can act in good faith and still fail to comply with the law .... a sad predicament," A. 51a.

[2] *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

[3] Here the change, issued two years after the original technical assistance manual, without explanation or the consideration engendered by notice and comment contradicted public advice by a Civil Rights Division official to dozens of sports-facility operators soon after the regulation's issuance. C.A.A. 1211.

[4] Respondents describe the Court of Appeals as holding "that the Department's 'quite natural[]' interpretation of its regulation was entitled to judicial deference. A. 8a." Br. Opp. 2. What the court said was that "the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without any obstruction." A. 8a. But the court on the very next page went on to emphasize: "But whether that refers to permanent obstructions or those caused temporarily by standing spectators . . . *is by no means obvious.*" A. 9a (emphasis supplied).

ron would or should be the governing precedent in considering whether to defer to an agency's interpretation of a regulation." Br. Opp. 15-16. But on the contrary, the Court's explicit holding was that *Chevron*-level deference governed. A. 12a-13a. Citing *Chevron* nine times in its opinion, the Court reasoned that "[t]he resolution of ambiguities in a regulation implicates the same sort of policy choices it does with regard to a statute." A. 13a.

As the petition pointed out, Pet. Cert. 19-20, and respondents never address, the D.C. Circuit did not and could not rely directly on *Seminole Rock*, because that case based judicial deference upon the agency's being author of the regulation—whereas here the language was drafted and adopted, after comment, by another agency (the Access Board), which indeed publicly ascribed to it a completely opposite meaning.[5] It was that circumstance that led the D.C. Circuit to import *Chevron* reasoning as the basis for giving the 1994 supplement to the manual controlling weight, while also equating *Chevron*-level deference with that of *Seminole Rock*. A. 10a.

4. Respondents are unable to deny that at least eight Circuits, contrary to the D.C. Circuit, give only *Skidmore*-level deference to agency interpretations generally, and that at least four have emphasized that they give particularly diminished deference to interpretations announced in informal formats. See Pet. Cert. 11-15. There is ample support for that position in this Court's opinions.

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[5] As both the District Court and the Court of Appeals recognized, the Access Board repeatedly stated in the *Federal Register* that it was deferring action on requests to "expand" the provision to add a requirement for views over standing spectators. See C.A.A. 330; 56 Fed. Reg. 2296, 2314 (1991); 56 Fed. Reg. 35408, 35440 (1991); Pet. Cert. 3. "If the Department, when it promulgated the regulation, had said what the Board said, or even clearly adopted what the Board said, it would be hard to conclude that the Department did not subsequently 'amend' the regulation in violation of the APA." A. 16a. Respondents err in suggesting, Br. Opp. 24, that the Access Board's authorship and rulemaking can be dismissed, as the D.C. Circuit did here, A. 12a, in determining the appropriate level of deference.

See *Heintz* v. *Jenkins*, 514 U.S. 291, 298 (1995); *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981); Pet. Cert. 18 and cases there cited. In fact, in *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328 (1994), this Court explicitly reserved the question "whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference." 511 U.S. at 339 n.5.

The split of authority was acknowledged as recently as last month by the Seventh Circuit, holding that informal agency interpretations merit "some weight' but "are not entitled to *Chevron* deference." *First Chicago NBD Corp.* v. *Commissioner*, 1998 WL 28113, at *2 (7th Cir. 1998). Respondents ultimately concede that this "may or may not be an open question." Br. Opp. 14. But they try to limit the "open question" to informal agency interpretations of statutes. For interpretations of regulations, they argue, the degree of judicial deference has been "clearly settled since 1945" and "the federal courts are not confused." Br. Opp. 14. That is not factually or logically correct.

a. First, several of the very cases cited in the petition concerned judicial review of interpretations of regulations.[6] Respondents counter with twelve cases that they say show that "Every one of the federal circuits has recently applied the test established in *Seminole Rock* and in its progeny as the standard for deference to an agency's interpretation of its regulations." Br. Opp. 10-11 n.5. But most of the cases they cite do not address deference to informal interpretations. In fact, eight of the twelve were cases that deferred to agency *adjudications*. In the other four, the courts construed the regulations

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[6] See Pet. Cert. 12, 15, citing *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327, 1333 (9th Cir. 1997); *Soileau* v. *Guilford of Maine, Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997); *Shalala* v. *St. Paul-Ramsey Med. Center*, 50 F.3d 522, 527 n.4 (8th Cir. 1995); *Dalheim* v. *KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990); and *Avol* v. *Secretary of HHS*, 883 F.2d 659, 661 (9th Cir. 1989).

themselves, mentioning *Seminole Rock* only in dicta.[7]

b. Second, it is indeed true that many cases exist applying the pre-APA decision in *Seminole Rock*. The problem respondents totally ignore is that there also are dozens of other cases that instead have applied, particularly to informal interpretations of regulations, the far less deferential standard of *Skidmore*. The result is two inconsistent and unreconciled lines of authority. At the level of this Court, as the petition pointed out, in some cases this Court has cited *Seminole Rock*, in others *Skidmore*, but never both in the same opinion. Pet. Cert. 21 n.9.

At the level of the courts of appeals, the confusion is rampant. Respondents assert that "Since the 1940's, the federal courts have observed a clear distinction between the rules of deference for agency interpretations of regulations, *see Seminole Rock* (decided in 1945) and the deference rules governing agency interpretations of statutes, *see Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)." Br. Opp. 13. But there has not been any such "clear distinction" at all. The cases show just the opposite. In reality, the Circuits sometimes apply *Skidmore* deference, sometimes *Seminole Rock* deference, to agency interpretations of regulations.[8] Sometimes they have relied on both *Seminole Rock* and *Skidmore* in the very same opinions.[9] Respondents are pointing to only one of two wholly

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[7] *Love* v. *Tippy*, 1998 WL 3410, at *2 n.6 (8th Cir. 1998); *Comet Enterprises, Inc.* v. *Air-A-Plane Corp.*, 128 F.3d 855, 859 (4th Cir. 1997); *Ramey* v. *Gober*, 120 F.3d 1239, 1245-46 (Fed. Cir. 1997); *Interstate Brands Corp.* v. *Local 441*, 39 F.3d 1159, 1163 (11th Cir. 1994).

[8] For typical examples of courts of appeals applying only the *Skidmore* level of deference to agency interpretations of regulations, see *Reich* v. *New York*, 3 F.3d 581, 587-88 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Klein* v. *Rush-Presbyterian-St. Luke's Med. Center*, 990 F.2d 279, 285 (7th Cir. 1993); *Guerrero* v. *Stone*, 970 F.2d 626, 638 (9th Cir. 1992); *Mullen* v. *Brown*, 800 F.2d 535, 543 (6th Cir. 1986); *Sioux Valley Hosp.* v. *Bowen*, 792 F.2d 715, 719 (8th Cir. 1986); *Burnley* v. *Short*, 730 F.2d 136, 139 (4th Cir. 1984).

[9] *E.g.*, *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 907 (7th Cir. 1990); *Standard Oil Co.* v. *Department of Energy*, 596

unreconciled lines of decision, totally ignoring the other, and then saying that everything is "clear." And now the D.C. Circuit heightens the confusion by holding that the proper basis for deference is to be found in *Chevron*.

If, as respondents argue, the law is so clear and settled, one must wonder why courts and distinterested commentators have repeatedly urged that "The Court should resolve this [deference] question, not only for memoranda but for all informal formats." Anthony, *The Supreme Court and the APA*, 10 ADMIN. L. J. 1, 20 (1996). See also statements of Davis, Pierce, Sunstein, Manning and Koch at Pet. Cert. 16-17, 19-21. One court of appeals, describing the law as "quicksand," complained of embarking on a "sea of murky precedents to divine our power to overturn an agency's interpretation of its own regulations." *Ohio State Univ.* v. *HHS*, 996 F.2d 122, 123-24 & n.1 (6th Cir. 1993), *vacated mem.*, 512 U.S. 1231 (1994). "[N]either the Supreme Court nor the lower federal courts have developed or applied consistent deference standards." Weaver & Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEMPHIS ST. U.L. REV. 411, 426 (1992). The confusion in the lower courts is not something petitioners have imagined.

c. Third, respondents offer no logical reason why, when an agency interpretation is issued without adjudication or rulemaking, the courts should give the informal statement greater deference if it purports to interpret a regulation rather than a statute. Formally issued regulation, like statutes, can bind the public. If the kind of provision being informally interpreted should matter at all, the commentators reason, then judicial deference should be *less* for an informal interpretation of a regulation,

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F.2d 1029, 1055-56 (T.E.C.A. 1978); *General Electric Co.* v. *OSHRC*, 583 F.2d 61, 64 (2d Cir. 1978); *Bone* v. *Hibernia Bank*, 493 F.2d 135, 139 (9th Cir. 1974); *Fleming* v. *Campbell*, 160 F.2d 315, 317 (6th Cir. 1947); *Southern Goods Corp.* v. *Bowles*, 158 F.2d 587, 590 (4th Cir. 1946).

because otherwise there would be no real check, not even APA public notice and comment, on agency machinations. See Pet. Cert. 16-21.

5. It is surprising that respondents argue that in issuing the change to the technical assistance manual, the Justice Department "was acting at the height of its powers." Br. Opp. 16. Surely that cannot be so. Agency rulings emerging from adjudications are the product of adversaries and a judge; APA rulemaking provides advance public notice, an opportunity for public comment, and a requirement that the agency consider comments and then explain its decision. 5 U.S.C. § 553(c). Here, by contrast, the agency acted unchecked without public participation and without explanation, and with none of those APA-mandated safeguards. An agency "is not entitled to deference if it did not exercise rulemaking power in the particular case." Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2093 (1990).

The D.C. Circuit held that the statute's provision for technical assistance "contemplated a continuing administration of the regulation that approaches, if not equates with, the adjudicatory authority of other schemes." A. 14a. But the Americans With Disabilities Act did not authorize lawmaking by technical manuals. Quite the contrary, mindful that construction of buildings depends on clear directions, the statute explicitly required that its mandate be implemented by formal *regulations*. 42 U.S.C. § 12186(b), (c). Separately the ADA directs that both the Justice Department and the Access Board assist the entities affected by providing various forms of technical assistance, 42 U.S.C. § 12206(c), including manuals, 42 U.S.C. § 12206(c)(3). The statute thus not only mandates that requirements shall be imposed clearly and by regulation—it distinguishes technical documents as filling a different role. The Court of Appeals, in equating a technical manual with "adjudicatory authority" under the APA, ignores the unconstrained nature of informal issuances and highlights the very issue calling for this Court's review.

B. The Administrative Procedure Act Issue.

The second question presented—the effect of the present decision on the notice-and-comment regime enacted by the Administrative Procedure Act as a check on agency power—respondents address only superficially.

The Administrative Procedure Act in 5 U.S.C. § 553 (b)(A) enacts a key categorical distinction, exempting from notice-and-comment requirements those agency issuances that are merely 'interpretative." The D.C. Circuit observed that "it is quite difficult to draw a line between substantive and interpretative rules." A. 18a. Respondents say that difficulties and differences among the Circuits in applying § 553 are insignificant, and that the petition is "nitpicking." Br. Opp. 20a.

1. Some Circuits hold that § 553 requires them to look at context. *E.g.*, *Hamlet* v. *United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1542 (1996). Some look at practical impact. *E.g.*, *Hoctor* v. *USDA*, 82 F.3d 165, 170-71 (7th Cir. 1996); *La Casa del Convaleciente* v. *Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992). The D.C. Circuit now has concluded that "interpretative" means any issuance that can be sufficiently "linguistically" linked to a regulation is exempted from the APA requirement. A. 18a-19a. It is difficult to imagine any interpretation an agency might likely issue that could not be brought within that test. So the holding here robs the APA notice-and-comment restraint of most real-world force.

2. No other Circuit has adopted the D.C. Circuit's reading of § 553(b)(A). Respondents themselves, while at one point saying "[t]here is no circuit split," Br. Opp. 3, later concede that the First Circuit holds "impact" to be relevant to whether § 553(b) requires rulemaking. Br. Opp. 21, citing *La Casa del Convaleciente* v. *Sullivan*, *supra*. So, clearly, does the Seventh. In *Hoctor* v. *USDA*, *supra*, the court through Chief Judge Posner held that a regulatory interpretation requiring animal dealers to erect higher fences was so costly that it could not be issued

without allowing them notice and an opportunity to comment. Yet here the D.C. Circuit holds that requiring what the District Court found were "demanding, and controversial, design requirements," A. 50a, affecting sports arenas throughout the country, can escape APA notice and comment altogether. See also *First Nat'l Bank* v. *Sanders*, 946 F.2d 1185, 1189 n.2 (6th Cir. 1991) (pointing out the circuit split). To correct the miscitation of the 4-3 decision in *United States* v. *Thompson*, 687 F.2d 1279 (10th Cir. 1982) (*en banc*), does not eliminate the Circuit split, nor diminish the forceful reasoning of the three dissenting judges and the importance of informing the lower courts how they are to apply this key APA provision. To point out the differences in interpreting § 553(b) is not "nitpicking."

C. The Issues Are Sharply Presented.

This case well presents these important questions. The pertinent record is short and simple, and both courts made clear that the outcome turns on level of deference. See A. 9a, 17a (Court of Appeals) ("by no means obvious" interpretation; "the issue is not easy"); A. 46a (District Court) ("[t]he Court feels bound to give deference"); *cf. Caruso* v. *Blockbuster-Sony Music Entertainment Centre*, 968 F. Supp. 210, 217 (D.N.J. 1997), *appeal pending* (holding views over standing spectators not required, after concluding same manual supplement did not merit deference). As for respondents' speculation that the law someday might change, Br. Opp. 25-26, the Access Board since 1991 has been apointing committees and commissioning study after study and saying the topic is under review, *e.g.*, 56 Fed. Reg. at 35440 (1991), 57 Fed. Reg. 60618 (1992), A. 44a; moreover, the latest proposed revision, to which respondents refer without describing it, would not alter the disputed language at all. See C.A.A. 375. Similarly, the Justice Department has never proposed or announced any intention of changing its manual or regulation.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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